

No. 03-19-00198-CV

In the Court of Appeals
Third Judicial District

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JEFFREY D. KYLE
Clerk

Madeleine Connor,
Appellant

VS.

Douglas Hooks,
Appellee

From the 201st District Court of Travis County, Texas
Cause number D-1-GN-18-005130
The Honorable Catherine Mauzy, District Judge Presiding

APPELLANT'S BRIEF

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ORAL ARGUMENT CONDITIONALLY REQUESTED

IDENTITY OF PARTIES AND COUNSEL

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STATEMENT REGARDING ORAL ARGUMENT

Appellant conditionally requests oral argument.

Appellant only requests oral argument if requested by Appellee and his request is granted by the Court.

STATEMENT OF THE CASE

The proceeding below is a Rule 202 pre-suit discovery case. CR 4-11. Appellee filed a Chapter 11 (Vexatious Litigant) motion, CR 13-99, which the Honorable Catherine Mauzy, Judge of the 419th Judicial District, Travis County, heard and granted. CR 266-268. Appellant filed a timely notice of appeal. See CR 276-277.

ISSUES PRESENTED

- 1. The trial court abused its discretion in declaring Connor a vexatious litigant, as the record evidence is legally and factually insufficient under any criteria of the statute, Tex. Civ. Prac. & Rem. Code § 11.0054 (Criteria for Finding Plaintiff a Vexatious Litigant).**
- 2. The trial court’s order declaring Appellant to be a vexatious litigant must be reversed because the trial court failed to issue a finding and/or conclusion of law, which is required under Tex. Civ. Prac. & Rem. Code § 11.054, that Appellee showed “there is not a reasonable probability that the plaintiff will prevail in the litigation against the defendant....”**
- 3. The trial court was without jurisdiction to decide the vexatious litigant motion because, before the district court granted the motion, Connor had filed a cause of action on the same facts and against the same parties and had non-suited her Rule 202 case with prejudice.**
- 4. The trial court erred in applying the vexatious litigant statute to a Rule 202 pre-suit investigation case.**
- 5. The vexatious litigant statute is unconstitutional on its face and as applied to Connor.**

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Appellee

From the 201st District Court of Travis County, Texas
Cause number D-1-GN-18-005130
The Honorable Catherine Mauzy, District Judge Presiding

APPELLANT'S BRIEF

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TO THE HONORABLE THIRD COURT OF APPEALS:

COMES NOW Appellant Madeleine Connor and files this her Appellant's Brief, requesting that the Court vacate the trial court's vexatious litigant order for want of jurisdiction and render dismissal of the Rule 202 suit. Alternatively, Appellant prays that the Court reverse the trial court's vexatious litigant order for an abuse of discretion.

In support of the relief requested, Appellant would show the Court as follows:

STATEMENT OF FACTS

On September 2, 2018, Appellant Madeleine Connor filed a Rule 202 suit against Douglas and Elizabeth Hooks to discover information about a false and fictitious AVVO.com review that Appellant had discovered on the AVVO website in mid-April of the same year (2018), after randomly googling herself. CR 5-12; Tex. R. Civ. P. 202.

The AVVO posting was dated June 1, 2017, CR 8, but as noted, Appellant had not discovered it until ten months after it was posted. CR 5, 8. The review described a non-existent legal representation by Connor, that in the fictitious client(s)/poster(s)' view, was unsatisfactory at best. CR 8. It read in total, and without grammatical corrections, as follows:

Very Poor courtroom manners

We hired Ms Connor to represent us and on our first hearing she came to court completely un-prepared. She told the judge “Well, I’m sorry” (with heavy sarcasm). That she was a busy attorney and didn’t have “time” for some of the “little” things and anyway her time to file wasn’t up so she still had time to do it. We changed lawyers after that so the damage to us was minimal. Our new attorney made many changes to our pleading and while he didn’t say anything particularly bad about what she’d written he wasn’t impressed either. Since we’re finally finished with our case I feel like I can post this now - I’ve been shocked in googling Ms Connor about the press she’s received since then as well as doing a court search to see the other filings she’s made for herself as well as others. I wish we’d done better research before we’d wasted money on her services. I’ll know better next time.

See CR 8.

Within just a day or two of its discovery, Appellant began efforts to find out the identity of the poster(s), since Connor was immediately aware that the posting was false, i.e.—that no such client(s) existed, or had ever existed. CR 5 at ¶ 7.

Although Appellant was initially unaware of who the imposter(s) were, their identities were revealed several months later by Appellee Douglas Hooks' lawyer, Sherry Rasmus, who sent Appellant communications – exactly one year after the posting was made – implicating Douglas Hooks in the posting, as AVVO had traced the posting to Douglas and Elizabeth Hooks' home IP address. CR 5 at ¶ 9; CR 9-11.

In an effort to diligently discover the identity of the imposter(s), Appellant had served a subpoena on AT&T in another matter (naming John and Jane Does), but the Presiding Judge of that proceeding quashed the subpoena. CR 82-86; RR Ex. 6.

Nevertheless, Appellant believed that the communications from Ms. Rasmus gave her enough information to file the instant Rule 202 petition without the quashed information from AT&T, who had – through the mere repeated communication to Connor from Rasmus – identified that the IP address used to post the review belonged to the Hookses. CR 8-11.

On the day before the hearing to obtain the Rule 202 depositions, however, Appellee and his spouse, Elizabeth Hooks,¹ filed Chapter 11 Vexatious Litigant

¹ Respondent Elizabeth Hooks did not request a ruling on her identical vexatious litigant motion, and the trial court did not rule on it or issue findings of fact and conclusions of law regarding her

motions. *See* Tex. Civ. Prac. & Rem. Code §§ 11.054. CR 13-99. Because Appellant lacked adequate notice of the vexatious litigant motions, CR 12, and the statute contains an automatic stay – Appellant agreed to pass on her Rule 202 hearing, and the motions were reset. *See* Tex. Civ. Prac. & Rem. Code § 11.052; *see also*, Tex. R. Civ. P. 202 (“Depositions Before Suit or to Investigate Claims”) *cf.* CR 278.

In an abundance of caution, the day prior to the second setting on the vexatious litigant motions, Appellant filed an actual lawsuit against the Hookses for defamation relating to the AVVO review, mootng the Rule 202 suit. *See* CR 139-145 (*Connor v. Hooks, et al.*, D-1-GN-19-00428, in the 459 District Court of Travis County); Tex. R. Civ. P. 202.5. However, because the district clerk had *sua sponte* rejected Connor’s filings in the past, Connor could not be sure that the district clerk would accept the filing—and thus proceeded accordingly during the hearing.

The Original Petition was accepted by the district clerk during the second (1/23/19) hearing on the Hookses’ vexatious-litigant motions, unbeknownst to

motion; therefore, Elizabeth Hooks is not a party to this appeal, and her vexatious-litigant motion became moot when the trial court lost plenary power on July 22, 2019. *See* Tex. R. Civ. P. 329b(e) (maximum plenary power of the trial court after timely motion for new trial has been filed is 105 days); CR 266 – 268; 280 – 286. This Court granted Connor’s motion to remove Elizabeth Hooks as an Appellee.

Connor. CR 139 (file-stamped 1/22/19). Connor, a short time later, filed a notice of non-suit with prejudice in the Rule 202 suit. CR 119.²

The Hon. Catherine Mauzy was assigned to preside over the second setting on the vexatious litigant motions. CR 148-53.

During the January 23, 2019, hearing, Connor attempted to present special exceptions to the Chapter 11 motions, but the Court refused to hear her motion. RR 22-, 24; CR 100-101. Nevertheless, Connor continued to complain throughout the hearing that the Hookses' motions did not provide adequate notice as to the precise element or elements in Chapter 11 under which they were moving. RR 9:14-25, 26:15-25, 31:4-7. In response, Counsel for Douglas Hooks repeatedly admitted that Appellees were only moving under subsection (3). RR 51:13-25; 54:20-21; *see* Tex. Civ. Prac. & Rem. Code § 11.054(3) ("the plaintiff has previously been declared to be a vexatious litigant by a state or federal court in an action or proceeding based on the same or substantially similar facts, transition, or occurrence"); *see* RR at 9:14-25, as follows:

MS. RASMUS:

We are here today, Your Honor, with respect to Civil Practice and Remedies Code Chapter 11 that addresses vexatious litigants. And in

² The filing of the non-suit and the true cause of action formed the basis for Connor's subsequent suggestion of mootness and plea to the jurisdiction.

11.054 the criteria for finding a plaintiff a vexatious litigant under (b)3; the plaintiff has previously been declared to be a vexatious litigant by State or Federal court in action or proceeding based on the same or substantially similar facts, transition or occurrence, which is the basis that we focus on with respect to our motion to deem her vexatious. Ms. Connor was deemed a vexatious litigant by the Honorable Robert Pittman [sic], Federal court judge in the Western District of Austin [sic]....

Also during the hearing, Connor asserted that Chapter 11 *does not* – by its own language – apply to Rule 202 actions. *See* Tex. Civ. Prac. & Rem. Code §§ 11.001,.051; RR 6:24-25, 7:9-19 & Ex. 6. Connor also argued that the cases presented by the Hookses under § 11.054(1)(A-C) were not final, were being double-counted, and generally, did not satisfy their burden under any statutory theory available. RR 25; 26:19-25; 27:7-16; 28:9-25; 29-33:1-16; 39:11-21; 43:21-25; 46:18-23; 51:5-12.

Although not Connor’s burden, the Court allowed Connor to supplement the record to show that the order relied upon by Appellee under § 11.054(3), an order of dismissal issued by the Hon. Robert L. Pitman, was not final, i.e.—that the order was interlocutory, and therefore could not be considered. RR 32:14-25, 33:1-6; 54:19-25, 55:1-6; 62:7-10. Connor also argued that the order of the Western District did not contain a “declaration” that Connor was vexatious—also defeating issuance of a vexatious litigant finding. *See also*, RR 25:8-19, 26:15-25, 22:24-25. Lastly,

Connor argued that the order of the Western District did not involve the Hookses—any claim regarding either movant—or any claim regarding the AVVO review at issue in the Rule 202 petition. RR 32:14-25.

After the hearing, Connor filed a motion to recuse and to disqualify Judge Mauzy because the newly-elected judge had served as her ex-husband's lawyer in several contentious SAPCR actions. CR 148-154. Connor also filed a suggestion of mootness, which J. Mauzy refused to hear, and subsequently, a plea to the jurisdiction due to the intervening acceptance by the district clerk of the lawsuit against the Hookses as defendants as well as the non-suit with prejudice. CR 131-33; 119.

Although J. Mauzy refused to consider the jurisdictional motions premised on both the new lawsuit being filed and the non-suit with prejudice, the judge appointed to hear the motions for disqualification and recusal judge, the Hon. Steve Ellis, ultimately agreed to hear the plea to the jurisdiction. CR 256, 278; 157-65. Judge Ellis denied all of Connor's motions, including the plea to the jurisdiction. CR 256.

Thereafter, on March 8, 2019, Judge Mauzy entered an order finding Connor to be vexatious. CR 266-68. Less than twenty days later, Connor timely filed her notice of appeal. CR 276-77. Connor filed a timely request for findings of fact and

conclusions of law; and the trial court submitted its findings of fact and conclusions of law on April 8, 2019. CR 280-86. Connor filed a timely motion for new trial, which the court refused to set for hearing. CR 289-315. Connor filed a motion to set the new-trial motion for hearing, which the Court also refused to hear. CR 316-19. Because the Court refused to hold a hearing on Connor’s motion for new trial after multiple requests, Connor filed a new-trial brief—before the expiration of the court’s plenary power. CR 320-28. The motion for new trial was overruled by operation of law. *See* Tex. R. Civ. P. 329b(c)-(e).

SUMMARY OF THE ARGUMENT

The trial court abused its discretion in granting Appellee’s vexatious litigant motion, as the record does not contain evidence to support any of the criteria of the vexatious litigant statute. And in any event, Appellee premised his motion only on § 11.054(3) (“the plaintiff has previously been declared to be a vexatious litigant by a state or federal court in an action or proceeding based on the same or substantially similar facts, transition, or occurrence”), which is unsupported in the record. CR 281. The trial court also lacked jurisdiction to issue the order, as the Rule 202 proceeding had been non-suited – and a new, true cause of action had been filed – prior to the trial court’s issuance of the vexatious-litigant order. CR 281. Similarly,

the Court erred in applying Chapter 11 to a Rule 202 suit, which by Chapter 11's own language, does not apply to a proceeding under Tex. R. Civ. P. 202. Lastly, the statute is facially unconstitutional and as applied to Connor.

ARGUMENT

ISSUE ONE: The trial court abused its discretion in declaring Connor a vexatious litigant, as the record evidence is legally and factually insufficient under any criteria of the statute, Tex. Civ. Prac. & Rem. Code § 11.0054 (Criteria for Finding Plaintiff a Vexatious Litigant).

The trial court abused its discretion in issuing a vexatious litigant finding against Connor, as neither the order nor the findings of fact and conclusions of law is supported by sufficient evidence in the record on any criteria under the statute.³ *See* Tex. Civ. Prac. & Rem. Code § 11.054; CR 266-68; 280-286.⁴

A court may find a plaintiff a vexatious litigant if the defendant shows there is not a reasonable probability the plaintiff will prevail in the litigation *and* that one of the grounds listed in paragraphs (1), (2) and (3) of § 11.054 is satisfied. *See*

³ This Court has concluded that “because a trial court may exercise its discretion to declare a party a vexatious litigant only if it first makes prescribed statutory evidentiary findings, we also review the trial court’s subsidiary findings under chapter 11 for legal and factual sufficiency.” *See Leonard v. Abbott*, 171 S.W.3d 451, 459 (Tex. App.—Austin 2005, pet. denied). Accordingly, Connor’s issues for review one and two are intended to embrace abuse of discretion and legal and factual sufficiency. *See id.*

⁴ Although Connor’s notice of appeal could be construed to apply to either or both Mr. and Mrs. Hooks, CR 276, the trial court only ruled on Mr. Hooks’ motion. CR 280-286.

Turner v. Grant, 2011 WL 5995538 (Tex. App.—Amarillo 2011, no pet.) (mem. op.) (citing § 11.054(1) (plaintiff has filed multiple suits in seven-year period); 11.054(2) (plaintiff repeatedly has attempted to relitigate claim); 11.054(3) (plaintiff has been declared vexatious litigant by another court in similar proceeding)).

A trial court abuses its discretion when it renders an arbitrary and unreasonable decision lacking support in the facts or circumstances of the case, or when it acts in an arbitrary or unreasonable manner without reference to guiding rules or principles. *Restrepo v. Alliance Riggers & Constructors, Ltd.*, 538 S.W.3d 724, 750 (Tex. App.—El Paso 2017, no pet.) (citing *Samlowski v. Wooten*, 332 S.W.3d 404, 410 (Tex. 2011)).

Section 11.054(1)-(3) specifies three alternative grounds necessary to a vexatious litigant determination. *See Turner*, 2011 Tex. App. LEXIS 9250 at *7. *See id.* At least one must be found. *See id.* § 11.054(1)-(3) (“no evidence supported a statutory ground for a vexatious litigant finding”).

The burden to establish record evidence of Chapter 11 criteria rests solely on the movant. *Nabelek v. Johnson*, 2005 Tex. App. LEXIS 2591, at *9-10 (Tex. App.—San Antonio 2005, pet. denied) (mem. op.).

Here, the trial court's findings of fact and conclusions of law reflect three separate and independent grounds for the vexatious litigant finding, that: **(a)** Connor had "previously been declared to be a vexatious litigant by a ... federal court in an action or proceeding based on the same or substantially similar facts, transition, or occurrence" pursuant to Tex. Civ. Prac. & Rem. Code § 11.054(3), CR 284-85; **(b)** "Connor had commenced, prosecuted, or maintained at least five litigations as a pro se litigant other than in small claims court that have been finally determined adversely to [her]" under Tex. Civ. Prac. & Rem. Code § 11.054(1); and **(c)**, after a litigation has been finally determined against Connor, Connor had repeatedly relitigated or attempted to relitigate the claim against the same defendant(s) under Tex. Civ. Prac. & Rem. Code § 11.054(2). See CR 282-284.

A. The record evidence is legally and factually insufficient to support the vexatious litigant finding under Tex. Civ. Prac. & Rem. Code § 11.054(3).

There is no record evidence to support the trial court's vexatious litigant finding on the ground that Connor had been previously "declared" a vexatious litigant in a case against Douglas Hooks relating to the false AVVO review. Specifically, Hooks failed to present evidence to the trial court that Connor "has previously been *declared* to be a vexatious litigant by a state or federal court in an

action or proceeding based *on the same or substantially similar facts, transition, or occurrence.*” See Tex. Civ. Prac. & Rem. Code § 11.054(3) (emphasis added).

Through judicial admission at the hearing on the vexatious litigant motion, and in his motion, CR 13, Appellee confined his ground for relief solely to § 11.054(3), i.e., that Connor “has previously been declared to be a vexatious litigant by a state or federal court in an action or proceeding based on the same or substantially similar facts, transition, or occurrence.” See Tex. Civ. Prac. & Rem. Code § 11.054(3); RR 51:15-22, 58:25-59-1 (trial court’s acknowledgment that Appellee was relying *solely* on § 11.054(3)); see *Wilson v. Wachsmann*, 2006 Tex. App. LEXIS 5850 * fn.7, 2006 WL 1865522 (Tex. App.—Austin 2006, no pet.) (mem. op. on reh’g) (“A judicial admission is conclusive upon the party making it, relieves the opposing party of its burden to prove the admitted fact, and bars the admitting party from disputing it.”) (citing *Mendoza v. Fidelity & Guar. Ins. Underwriters, Inc.*, 606 S.W.2d 692, 694 (Tex. 1980)).⁵

⁵ Because Hooks moved only under Tex. Civ. Prac. & Rem. Code § 11.504(3), the trial court erred in considering other grounds under the statute. In an abundance of caution and to avoid a misapplied waiver decision, Connor addresses and challenges all findings in the trial court’s orders. See Tex. R. Civ. P. 299 (“When findings of fact are filed by the trial court they shall form the basis of the judgment upon all grounds of recovery and of defense embraced therein. The judgment may not be supported upon appeal by a presumed finding upon any ground of recovery or defense, no element of which has been included in the findings of fact.....”).

There is simply no *declaration*, finding, announcement or formal statement by the Western District of Texas making clear or manifest that Connor is a vexatious litigant. CR 21-29. *See also*, Black’s Law Dictionary 512 (11th ed. 2019) (“Declaration”) (“A formal statement, proclamation or announcement, esp. one embodied in an instrument.”); Black’s Law Dictionary 409 (6th ed. 1990) (“Declare”) (“To make known, manifest, or clear....To publish...to announce clearly some opinion or resolution.”). Thus, the trial court abused its discretion in finding Connor to be a vexatious litigant under subsection (3) because Connor was not “declared” to be a vexatious litigant previously in a suit “based on the same or substantially similar facts, transition, or occurrence.” *See Scott v. Tex. Dep’t of Crim. Justice-Institutional Div.*, 2008 Tex. App. LEXIS 8941 at *5 (Tex. App.—Corpus Christi 2008, no pet.) (mem. op.); *Comeaux v. Hamilton*, 2014 Tex. App. LEXIS 2976, *2-3, 2014 WL 1047271 (Tex. App.—Amarillo 2014, no pet.) (reversing VL order because “the record does not contain any evidence to support a declaration that Comeaux is a vexatious litigant.”) (citing *Turner*, 2011 Tex. App. LEXIS 9250, at *7-8).

The Western District of Texas’ order, relied on by Hooks and referenced by the trial court is devoid of a “declaration.” The order mentions the word “vexatious”

multiple times, but importantly, does not *declare* Connor a vexatious litigant, which is required by the statute. Tex. Civ. Prac. & Rem. Code § 11.504(3); CR 24, 25.

Likewise, there is no support in the record that Connor's suit resulting in the Western District's order involved or contained any claim against Hooks regarding the AVVO review. It just is not there. CR 21-29. Accordingly, Hooks did not meet his burden to show this essential element, and the trial court abused its discretion in awarding the relief requested—an order finding Connor to be a vexatious litigant due to a prior finding upon “the same or substantially similar facts, transition, or occurrence.” *See* Tex. Civ. Prac. & Rem. Code § 11.054(3).

In *Scott*, the San Antonio court of appeals identified reversible error under virtually identical circumstances as asserted here. Specifically, the Fourth Court of Appeals explained that it reversed in part because the record demonstrated that “the trial court...relied heavily on the 343rd District Court's finding that Scott was a vexatious litigant in cause number B-05-1223-CV-C” and noted that the movant failed to show “that the underlying facts in cause number B-05-1223-CV-C are substantially similar or arose out of the same occurrence or transaction as the present matter.” *See Scott v. Tex. Dep't of Crim. Justice-Institutional Div.*, 2008 Tex. App. LEXIS 8941 at *5.

Exactly like in *Scott*, Hooks failed to show that the Rule 202 suit and the suit he identified—a federal suit involving other facts and other defendants—were substantially the same. *See id.* Therefore, because the *present case* and the *federal case* Hooks relies on do not involve substantially similar facts or occurrences, section 11.054(3) is not applicable and the trial court abused its discretion in entering the vexatious litigant order under § 11.054(3) against Connor. This Court must vacate the order.

B. The record evidence is legally and factually insufficient to support the vexatious litigant finding under Tex. Civ. Prac. & Rem. Code § 11.054(1).⁶

The trial court must be reversed because record does not support the trial court’s findings of fact and conclusions of law with regard to the elements under subsection (1): that the plaintiff, in the seven-year period immediately preceding the date the defendant makes the motion under Section 11.051, has commenced, prosecuted, or maintained at least five litigations as a pro se litigant other than in a small claims court that have been: (A) finally determined adversely to the plaintiff;

⁶ Hooks’ motion did not mention this ground for the vexatious litigant order; therefore, it should not be considered by this Court. However, to avoid a misapplication of the waiver doctrine, Connor addresses and challenges it, as well as the trial court’s “throw-away” finding under Tex. Civ. Prac. & Rem. Code § 11.054(2), *supra* at p. 21.

(B) permitted to remain pending at least two years without having been brought to trial or hearing; or (C) determined by a trial or appellate court to be frivolous or groundless under state or federal laws or rules of procedure. *See* Tex. Civ. Prac. & Rem. Code § 11.054(1).

In the trial court’s Findings of Fact and Conclusions of Law, the court lists eighteen cause numbers, but the citations relate to only three cases—or four, if one cause is counted as a severance that was not objected to, i.e., ¶ 18, k. *See* CR 284 ¶ 18, k.

In any event, Hooks did not provide evidence in the hearing or his motion that any one of the cases listed was final when measured from “the date the defendant ma[de] the motion.” CR 13-97, 283-284 ¶ 18, a-r; Tex. Civ. Prac. & Rem. Code § 11.054(1). Thus, the Court must vacate the order finding Connor vexatious because the record is legally and factually insufficient to sustain the order. *See* Tex. Civ. Prac. & Rem. Code § 11.054(1)(A)-(C).

Similarly, Hooks did not offer evidence that the cases listed had been found frivolous or groundless, or had languished more than two years before being brought to trial or a hearing. The evidence just is not in the record. Therefore, the trial court

abused its discretion in finding Connor to be vexatious under Tex. Civ. Prac. & Rem. Code § 11.054(1).

Furthermore, as noted at the outset, Hooks did not meet his burden to show that there were five or more cases possessing the required characteristics in the seven years prior to Hooks' motion. Rather, while it was not her burden, Connor offered at least *some* evidence that the cases listed did not satisfy the requirements of the statute. See CR 289-290. In sum, Connor attested that:

- The case in Paragraph 18a was one case divided up by several remands and several appeals, and it had not been finally determined against Connor at the time of the motion, in any event. CR 289;
- The case in 18b was the same case as the case listed in ¶ 18a (D-1-GN-15-003714). *Id.*;
- The case in paragraph 18c was the same case as the case listed in ¶ 18a (D-1-GN-15-003714), and involved a mandamus from the denial of a temporary restraining order based on the same facts of the underlying suit (although Hooks provided no evidence or argument that it should be properly counted as a separate cause of action). *See, e.g., Retzlaff v. GoAmerica Communs. Corp.*, 356 S.W.3d 689 (Tex. App.—El Paso

2011, no pet.). Thus, it should not have been considered a separate case from D-1-GN-15-003714;

- The case in Paragraph 18d was not finally determined at the time Hooks filed his motion, and he provided no evidence that it had been finally determined at that time;
- The case in Paragraph 18e was a mandamus from D-1-GN-16-005883, complaining of a severance of that case, D-1-GN-16-005883. Hooks provided no argument or legal rationale as to why it should be considered a separate case from D-1-GN-16-005883 listed in paragraph 18d, and if so, under *Retzlaff*, why the trial cause number should also be counted or “double counted.” *See Retzlaff v. GoAmerica Communs. Corp.*, 356 S.W.3d at 700 (“We are counting only the appeals, not the underlying trial court cases. Because no double-counting is occurring here, we express no opinion regarding [Retzlaff’s double-counting] concern.”).
- The case listed in Paragraph 18f is an appeal in which Appellant actually prevailed, so it cannot support a case that was “finally

determined adversely to [Connor].” Therefore, it was an abuse of discretion for the trial court to consider this case in its order.

- The “cases” listed in Paragraphs 18g -i was actually only one case, and it had not been finally determined at the time Hooks filed his motion, as it was pending in the Fifth Circuit Court of Appeals in New Orleans. In any event, Hooks did not show that Connor “commenced, prosecuted, or maintained” the cases, which was his burden. CR 283-284.
- The case listed Paragraph 18j was an appeal from D-1-GN-16-005883, and was therefore, improperly double-counted; and in any event, Hooks did not proffer evidence that the case had been “finally determined” against Connor at the time he filed his motion. Further, Connor offered some evidence that it involved a severance over the objection of Appellant, CR 289, therefore, it should not have been counted as a separate case from D-1-GN-16-005883. *See Retzlaff v. GoAmerica Communs. Corp.*, 356 S.W.3d at 700 (“We are counting only the appeals, not the underlying trial court cases. Because no double-

counting is occurring here, we express no opinion regarding [Retzlaff's double-counting] concern.”); CR 284, 289;

- The case listed Paragraph 18k was severed from D-1-GN-16-005883 and had not been finally determined at the time of the filing of the motion (and the appeal is pending currently in this court in No. 03-19-00347-CV);
- The cases listed Paragraphs 18 l-r are appeals and severed matters (by removals and remands) all from D-1-GN-15-003714 (listed in ¶ 18a & ¶ 18b). Further, Hooks did not demonstrate that these cases were finally decided against Connor at the time of the filing his Chapter 11 motion, and in fact, no final order had issued in the case and the claims were still pending.

In sum, the cases listed in the court's finding of fact all derived from fewer than four original cases; none had been “finally determined” against Connor at the time of Hooks' motion, and one was not “commenced, prosecuted, or maintained” by Connor. *See* Tex. Civ. Prac. & Rem. Code § 11.054(1). Only one part of one case had been finally determined—but it had been born of a single matter, D-1-GN-15-003714. Therefore, the trial court abused its discretion in finding Connor to be a

vexatious litigant on this record, as Hooks did not satisfy his burden that there were five or more cases “finally determined” against Connor, that were not born of the same cause number or that were not “double counted.” CR 289-290; *Retzlaff v. GoAmerica Communs. Corp.*, 356 S.W.3d at 700 (“We are counting only the appeals, not the underlying trial court cases. Because no double-counting is occurring here, we express no opinion regarding [Retzlaff’s double-counting] concern.”).⁷ This Court should reverse the vexatious litigant finding under § 11.054(1).

C. The record evidence is legally and factually insufficient to support the cursory vexatious litigant finding under Tex. Civ. Prac. & Rem. Code § 11.054(2). (CR 285 ¶ 23).

In what appears to be a throw-away finding, that was not prosecuted by Hooks at all—neither in his motion nor in the oral hearing—the trial court appears to have determined that Connor violated Tex. Civ. Prac. & Rem. Code § 11.054(2)

⁷ In *Retzlaff*, the El Paso court of appeals noted other jurisdictions that counted appeals and mandamuses as separate causes of action in vexatious-litigant findings, *Retzlaff v. GoAmerica Communs. Corp.*, 356 S.W.3d at 699-700, but also cited a case that applied more sound reasoning in the matter: *Mahdavi v. Superior Court*, 82 Cal.Rptr.3d 121, 126 (Cal.Ct.App. 2008) (“A defendant who appeals an adverse ruling is not filing ‘new’ litigation or ‘maintaining’ litigation, but rather, is attempting to ‘undo’ the results of litigation that has been instituted against him or her.”). This Court should reject the reasoning that other courts of appeal have adopted that count appeals as separate in the five-case requirement and follow the reasoning of *Mahdavi v. Superior Court*, 82 Cal.Rptr.3d at 126.

(repeatedly relitigating the same final claims against the same defendants). See CR 285 ¶ 23. This finding, again, seems to be an afterthought, is not supported in the record, was not moved upon in writing or orally, and must be vacated. *Id*; CR 16 (Hooks makes no argument in his motion, for example, that the likely benefit of allowing discovery outweighs the burden or expense); *Turner v. Grant*, 2011 Tex. App. LEXIS 9250, *7-8, 2011 WL 5995538 (“Turner’s disclosure of prior lawsuits does not provide evidence he had attempted to relitigate matters previously determined, so there is no evidence for making a vexatious litigant determination under § 11.054(2).”).

In summary on issue one, none of the three criteria under the statute that resulted in findings by the trial court are supported by record evidence. Therefore, Issue for Review One must be granted. See *Leonard v. Abbott*, 171 S.W.3d 451, 459 (Tex. App.—Austin 2005, pet. denied); *Turner v. Grant*, 2011 Tex. App. LEXIS 9250, *7-8, 2011 WL 5995538 (“Of the lawsuits Turner listed, only two were commenced, prosecuted, or maintained in the seven-year...[t]here is thus no evidence for making a vexatious litigant determination under § 11.054(1)”).

ISSUE TWO: The trial court’s order declaring Appellant to be a vexatious litigant must be reversed because the trial court failed to issue a finding and/or conclusion of law, which is required under Tex. Civ. Prac. & Rem. Code §

11.054, that Appellee showed “there is not a reasonable probability that the plaintiff will prevail in the litigation against the defendant....”

The trial court’s order must be reversed because the court failed to issue a conclusion of law (or finding) under Tex. Civ. Prac. & Rem. Code § 11.054 that *Appellee showed* “there is not a reasonable probability that the plaintiff will prevail in the litigation against the defendant....” *See* Tex. Civ. Prac. & Rem. Code § 11.054. “This language clearly places the burden on the defendant.” *Retzlaff v. GoAmerica Communs. Corp.*, 356 S.W.3d at 703.

Under Tex. Civ. Prac. & Rem. Code § 11.054, a trial court must issue a conclusion of law that the defendant has demonstrated that “there is not a reasonable probability that the plaintiff will prevail in the litigation against the defendant....” That is, a court may only find a plaintiff to be a vexatious litigant “if the defendant *shows* there is not a reasonable probability the plaintiff will prevail in the litigation *and* that one of the grounds listed in paragraphs (1), (2) and (3) of § 11.054 is satisfied. *See* Tex. Civ. Prac. & Rem. Code § 11.054 (emphasis added); *Amir-Sharif v. Quick Trip Corp.*, 416 S.W.3d 914, 919 (Tex. App.—Dallas 2013, no pet.).

The trial court here did not issue a conclusion of law (or a finding of fact) that Hooks *showed* that Connor could not prevail in her request to obtain an order to depose Hooks under Rule 202. CR 280-286. In fact, the record reflects that Hooks

made no substantive motion or attack of any kind on the propriety of the Rule 202 relief sought by Connor. CR 4-11; 16 (conclusory statement that “Petitioner would not prevail in any future defamation litigation...”). The only challenge to the Rule 202 suit was Appellee’s Chapter 11 motion, which was completely devoid of any request that the trial court *find* that Connor could not prevail in her bid to have Hooks deposed under Rule 202. *See* Tex. R. Civ. P. 202 (setting out procedures and form of a Rule 202 motion, which was entirely unchallenged by Hooks); CR 280-286; CR 16 (no challenge showing unreasonable burden of the depositions).

The defendant seeking a vexatious litigant declaration bears the burden of establishing *both parts of the test set out in section 11.054* of the Texas Civil Practice and Remedies Code. *See Amir-Sharif v. Quick Trip Corp.*, 416 S.W.3d at 919 (citing Tex. Civ. Prac. & Rem. Code Ann. § 11.054 and noting that a “court may find plaintiff vexatious ‘if the defendant shows’ no reasonable probability of prevailing and one of the three litigation histories” and *Drake v. Andrews*, 294 S.W.3d 370, 374 (Tex. App.—Dallas 2009, pet. denied) (Ch. 11 “details a two-step process. First, *in every instance, the judge must conclude there is no reasonable probability the plaintiff will prevail in his litigation against the defendant.*”) (emphasis added)).

“A plaintiff may offer evidence to show there is a reasonable probability he will prevail in the litigation, but it is not his burden to do so.” *See Drake*, 294 S.W.3d at 375-76. “When the defendant offers evidence sufficient to satisfy the second part of the test relating to litigation history, *but fails to offer any evidence showing why the plaintiff could not prevail in the suit, the defendant has failed to meet his burden.*” *Id.* (emphasis added).

Because the trial court failed to issue a conclusion of law (or any related finding) regarding the required first step under Tex. Civ. Prac. & Rem. Code § 11.054, demonstrating Appellee’s showing that Connor could not prevail in the Rule 202 suit, the trial court’s vexatious litigant order must be reversed. *Id.*; *Amir-Sharif v. Quick Trip Corp.*, 416 S.W.3d at 919.

Having proffered no evidence to show that Connor could not have reasonably prevailed in obtaining the Rule 202 deposition, the Court must reverse the order finding Connor to be a vexatious litigant. *See id.*

ISSUE THREE: The trial court was without jurisdiction to decide the vexatious litigant motion because, before the district court granted the motion, Connor had filed a cause of action on the same facts and against the same parties and had non-suited her Rule 202 case with prejudice.

Once Connor sued Doug and Elizabeth Hooks in a real lawsuit based on the AVVO review, and non-suited the pre-suit investigation, the Rule 202 suit became

moot. *See Glassdoor, Inc. v. Andra Grp., L.P.*, 575 S.W.3d 523, 527 (Tex. 2019) (“a case becomes moot during the pendency of the litigation “if, since the time of filing, there has ceased to exist a justiciable controversy between the parties—that is, if the issues presented are no longer ‘live,’ or if the parties lack a legally cognizable interest in the outcome.”) (quoting *Heckman v. Williamson County*, 369 S.W.3d 137, 162 (Tex. 2012)). If a case becomes moot, the court must vacate all previously issued orders and judgments and dismiss the case for want of jurisdiction. *Heckman*, 369 S.W.3d at 162.

Again, on January 22, 2019, in an abundance of caution and because Appellee had never denied posting the fake, defamatory AVVO review pretending to be former client of Appellant’s law practice, Appellant abandoned her Rule 202 suit and filed a true cause of action against the Hookses. CR. 119. The effect of the filing of the true cause of action and abandoning the pre-suit deposition proceeding by non-suit, resulted in a loss of subject-matter jurisdiction over the Rule 202 proceeding. *See Securtec, Inc. v. County of Gregg*, 106 S.W.3d 803, 810 (Tex. App.—Texarkana 2003, pet. denied) (“A justiciable controversy must involve a dispute of something more than a hypothetical or abstract character.”). This is because, of course, the cause of action filed allows for oral depositions in the course

of discovery—therefore the request for depositions under Rule 202 were rendered instantly moot. *See* Tex. R. Civ. P. 199 (depositions upon oral examination). The district clerk accepted the filing of the true cause of action during the hearing on the Appellees’ motions brought under Chapter 11; and because the cause of action was filed and accepted by the clerk, the Rule 202 suit became moot. *See* Tex. R. Civ. P. 199; *Glassdoor*, 575 S.W.3d at 527.

Also, as Rule 202 does not afford a respondent a right to seek “affirmative relief,” Appellee’s motion was never proper to begin with, but undoubtedly during the time the trial court improperly continued to preside, no order could issue granting Hooks “affirmative relief” of any kind.

A party has an absolute right to file a nonsuit, and a trial court is without discretion to refuse an order dismissing a case because of a nonsuit unless collateral matters remain. *See Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010). “The plaintiff’s right to take a nonsuit is unqualified and absolute so long as the defendant has not made a claim for affirmative relief.” *In re Greater Houston Orthopaedic Specialists, Inc.*, 295 S.W.3d 323, 324 (Tex. 2009) (orig. proceeding) (per curiam). A nonsuit “extinguishes a case or controversy from the moment the motion is filed or an oral motion is made in open court; the only requirement is the

mere filing of the motion with the clerk of the court.” *Travelers Ins.*, 315 S.W.3d at 862; *In re Bennett*, 960 S.W.2d 35, 38 (Tex. 1997) (orig. proceeding) (per curiam) (“Such a nonsuit may have the effect of vitiating earlier interlocutory orders and of precluding further action by the trial court, with some notable exceptions.”).

Texas Rule of Civil Procedure 162 (Dismissal or non-suit) provides in pertinent part:

At any time before the plaintiff has introduced all of his evidence other than rebuttal evidence, the plaintiff may dismiss a case, or take a non-suit, which shall be entered in the minutes. ... Any dismissal pursuant to this rule shall not prejudice the right of an adverse party to be heard on a pending claim for affirmative relief.... A dismissal under this rule shall have no effect on any motion for sanctions, attorney’s fees or other costs, pending at the time of dismissal, as determined by the court.

Again, Rule 202 does not permit Appellees to assert “claim[s] for affirmative relief” – it is just not in the rule – and Appellee did not have any “pending motions for sanctions, attorney’s fees or other costs, pending at the time of dismissal.” Moreover, the “claim for affirmative relief” language likely applies to counterclaims in a real lawsuit, where a plaintiff is actually asserting one or more claims. “Claims,” per se, are not permitted in Rule 202 suits by either side—in fact, the only relief that a 202 suit can bring is whether pre-suit depositions will be allowed or not. *See Tex.*

R. Civ. P. 202.1 (“A person may petition the court for an order authorizing the taking of a deposition on oral examination or written questions....”).

Accordingly, the Rule 202 case was rendered moot, and no order could properly issue other than a judgment of dismissal, which is not necessary in any event. But, more importantly, because a true cause of action – asserting the AVVO defamation claims against Hooks as a defendant, the Rule 202 Petition became moot. *See Connor v. Douglas Hooks, et. al*, No. D-1-GN-19-000428, in the 459th District Court of Travis County, Texas. And in that suit, Appellee, as a defendant could have chosen to proceed under Chapter 11 (but did not) or assert “claim[s] for affirmative relief.”

This Court must grant Issue Three, as the trial court lacked jurisdiction to issue any order after the filing of the non-suit and *Connor v. Douglas Hooks, et. al*, No. D-1-GN-19-000428, in the 459th District Court of Travis County, Texas.

ISSUE FOUR: The trial court erred in applying the vexatious litigant statute to a Rule 202 pre-suit investigation case.

By definition, Chapter 11 does not apply to Rule 202 pre-suit investigations. *See* Tex. Civ. Prac. & Rem. Code §§ 11.001 (Definitions) (1) (“Defendant” means a person or governmental entity against whom a plaintiff commences or maintains or

seeks to commence or maintain a litigation.”) (2) (“Litigation” means a civil action commenced, maintained, or pending in any state or federal court.”).

Likewise, under section 11.051, the statute provides that “the *defendant* may, on or before the 90th day after the date the *defendant* files the original answer or makes a special appearance, move the court for an order... determining that the *plaintiff* is a vexatious litigant...” Tex. Civ. Prac. & Rem. Code § 11.051 (emphasis added).

A “respondent” in a 202 suit has no opportunity to file an answer. Tex. R. Civ. P. 202. It is not in the rule. Therefore, a vexatious litigant motion is not cognizable or properly permitted in a Rule 202 pre-suit investigation, and the trial court erred in allowing the Chapter 11 motions to proceed. *See Epps v. Fowler*, 351 S.W.3d 862, 868 (Tex. 2011) (a nonsuit does not affect any pending claim for affirmative relief or motion for attorneys’ fees under Tex. R. Civ. P. 162).

This issue presents a question of first impression, as no court of appeals has decided whether a motion under Chapter 11 is actionable in a Rule 202 proceeding. By the statute’s plain language, using “Petitioner” instead of “Plaintiff” and “Respondent” instead of “Defendant,” this Court should hold that the trial court erred in allowing Hooks’ motion to go forward. *Lippincott v. Whisenhunt*, 462

S.W.3d 507 (Tex. 2015) (“Our objective in construing a statute is to give effect to the Legislature’s intent, which requires us to first look to the statute’s plain language.”).

ISSUE FIVE: The vexatious litigant statute is unconstitutional on its face and as applied to Connor.

In her motion for new trial and her new trial brief, Connor argued that the Texas Vexatious Litigant Statute violates the Texas and United States Constitutions. *See* U.S. Const. amend. I and Tex. Const. art. I, § 27. CR 291, 320-328.

In *Marbury v. Madison*, Chief Justice John Marshall described the ability to obtain civil redress as the “very essence of civil liberty.” 5 U.S. (1 Cranch) 137, 163 (1803) (“The very essence of civil liberty certainly consists in the right *of every individual* to claim the protection of the laws, whenever he receives an injury.”) (emphasis added).

The statute at issue, Tex. Civ. Prac. & Rem. Code Chapter 11, is unconstitutional on its face, as it deprives some citizens of the right to seek protection of the laws due to a civil injury. *See id.*; U.S. Const. amend. I and Tex. Const. art. I, § 27. Specifically, the statute is unconstitutional because it infringes upon a citizen’s right to petition for redress of grievances under U.S. Const. amends. I, XIV and Tex. Const. art. I, §§ 19, 27, and acts as an unconstitutional prior restraint of

protected First Amendment liberties, among other constitutional infirmities outlined below. *See Davenport v. Garcia*, 834 S.W.2d 4, 10 (Tex. 1992) (holding that a prior restraint is ***presumptively unconstitutional*** under the Texas Constitution); *Wolff v. McDonnell*, 418 U.S. 539 (1974) (constitutional basis for the right of access to the courts is also guaranteed by the due process clause).

The right to petition for redress of grievances is inseparable from the right of free speech. *Puckett v. State*, 801 S.W.2d 188, 192 (Tex. App.—Houston [14th Dist.] 1990, writ ref’d) (citing *Johnson v. San Jacinto Junior College*, 498 F. Supp. 555, 578 (S.D. Tex. 1980)). “Although the rights are distinct guarantees, they were cut from the same constitutional cloth and were inspired by the same principles and ideals.” *Id.* (citing *Singh v. Lamar University*, 635 F. Supp. 737, 739 (E.D. Tex. 1986)). As general rule, the rights are subject to the same constitutional analysis. *Id.*⁸

Appellant’s constitutional rights to access the courts under the United States and Texas Constitutions were infringed, and continue to be infringed upon, by

⁸ Texas constitutional provisions guaranteeing freedom of expression and assembly are coextensive with the corresponding federal guarantees. *Reed v. State*, 762 S.W.2d 640, 644 (Tex. App.—Texarkana 1988, pet. ref’d). *But see, O’Quinn v. State Bar of Texas*, 763 S.W.2d 397, 402 (Tex.1988) (noting that “Texas’ free speech right [has been characterized] as being broader than its federal equivalent,” the court concluded that “it is quite obvious that the Texas Constitution’s affirmative grant of free speech is more broadly worded than the first amendment”).

application of the Texas Vexatious Litigant Statute. Accordingly, this Court should vacate the trial court's order by granting issue five.

There are no limitations to the right to petition or open courts under the Texas and the United States Constitutions. *See* U.S. Const. amends. I (right to petition) XIV (due process); Tex. Const. art. I, § 13 (“All courts shall be open, and every person for an injury done him . . . shall have remedy by due course of law”); Tex. Const. art. I, § 27; Tex. Const. art. I, § 19 (due course of law); Tex. Const. art. I, § 29 (rights shall remain inviolate).

The Supreme Court of the United States has declared the First Amendment freedom to petition and access the Courts to be cognate rights, equal in dignity to the freedom of speech. *See Borough of Duryea v. Guarnieri*, 564 U.S. 379, 388 (2011). These are federally protected constitutional rights that the State—through the statute—has declared forfeited. *See Chambers v. Baltimore & O. R. Co.*, 207 U.S. 142, 148 (1907) (“right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each State to the citizens of all other States to the precise extent that it is allowed to its own citizens.”); *see also Bill*

Johnson's Rests. v. NLRB, 461 U.S. 731, 741(1983) (“the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances”); *cf. Leonard v. Abbott*, 171 S.W.3d at 456-58 (holding that the statute is not unconstitutional because it strikes a balance between Texans’ right of access to their courts and the public interest in protecting defendants from those who abuse the Texas court system by systematically filing lawsuits with little or no merit); *Cooper v. McNulty*, 2016 Tex. App. LEXIS 11333, *11, 2016 WL 6093999 (Tex. App.—Dallas 2016, no pet.); *Retzlaff v. GoAmerica Communs. Corp.*, 356 S.W.3d at 702; *Sweed v. Nye*, 319 S.W.3d 791, 793 (Tex. App.—El Paso 2010, pet. denied); *Dolenz v. Boundy*, No. 05-08-01052-CV, 2009 LEXIS 9196, *9, 2009 WL 4283106 (Tex. App.—Dallas 2009, no pet.); *In re Potts*, 357 S.W.3d 766, 769 (Tex. App.—Houston [14th Dist.] 2011, orig. proceeding); *Johnson v. Sloan*, 320 S.W.3d 388, 389-90 (Tex. App.—El Paso 2010, pet. denied); *Clifton v. Walters*, 308 S.W.3d 94, 101-02 (Tex. App.—Fort Worth 2010, pet. denied); *In re Johnson*, No. 07-07-0245-CV, 2008 Tex. App. LEXIS 5110, 2008 WL 2681314, at *2 (Tex. App.—Amarillo 2008) (orig. proceeding).

All of the appellate courts referenced above who have addressed the constitutionality of the statute have determined—with virtually no reasoning—that

the statute is not unconstitutional on its face; that, it does not authorize courts to act arbitrarily; that it only permits courts to restrict a plaintiff's access to the courts after making specific findings of vexatiousness; and that the restrictions are not unreasonable or arbitrary when balanced against the purpose and basis of the statute. *See supra.*

However, Connor argues that the collective and nearly identical reasoning does not adequately address the United States and Texas Constitutions' mandate that no restrictions may be placed on the right to petition. But, on the contrary, the statute places multiple restrictions on the higher constitutional provisions—and additionally, because it allows for arbitrary application, it is unreasonable and vague. Thus, in these regards, the Court should find that the statute violates the United States and Texas Constitutions, and issue five should be granted because neither the Texas Supreme Court nor the U.S. Supreme Court has ever weighed in on any constitutional-infirmity arguments in any case challenging the statute. *See Armstrong, v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378, 1383-84 (2015) (supremacy clause requires courts to invalidate state laws that conflict with federal laws). Indeed, there are no Supreme Court cases limiting the petition clause of the United States Constitution, yet Texas has enacted the Vexatious Litigant Statute,

which arbitrarily limits the freedom to petition to five (5) unsuccessful lawsuits within seven (7) years, then allows the imposition of a monetary injunction (which is also arbitrary), and under the threat of contempt, requires pre-filing approval to access the Courts. *See* Tex. Civ. Prac. & Rem Code § 11, *et seq.* This prohibitive framework violates the Texas and the United States Constitutions—because it imposes multiple onerous limitations on a citizen’s right to petition—which is not found in either constitution. *See* Tex. Const. art. I, § 29 (rights shall remain inviolate). And the statute can be, and is, applied unequally and without standards as to, for example, the amount of pre-filing bond ordered. Specifically, even a cursory review of the latest entries on the vexatious litigant website, demonstrates a wide range of possible financial burdens that may be placed on a citizen, ranging from no bond, to a likely death-knell amount of nearly \$20,000 to proceed. *See* <http://www.txcourts.gov/judicial-data/vexatious-litigants/> Clearly then, the statute permits standardless, arbitrary application, as is the case with Appellant.

Further, the statute does not contain a provision that a vexatious litigant so declared may ever seek to remove the designation, if he or she does not prevail on an appeal of the original order. *See* Tex. Civ. Prac. & Rem. Code § 11.101(c). If the citizen fails to timely appeal, for example, the citizen is simply branded for life

as a “vexatious litigant.” This is punitive and plainly unconstitutional, as it blacklists citizens for life. *See id.*, § 11.104(a). Therefore, the Court should grant Appellant’s issue for review five to address this and the numerous other infirmities contained in the statute.

The U.S. Supreme Court has repeatedly opined that prior restraint on the freedom of speech is unconstitutional. The Texas Supreme Court has consistently and correctly echoed this constitutional principle. *See, e.g., Lippincott v. Whisenhunt*, 462 S.W.3d at 508. Because the freedom of speech and the freedom to petition are cognate rights equal in dignity, the vexatious litigant statute should be declared unconstitutional as a prior restraint on these freedoms, absent clear and present danger threatening public interest. *See California Motor Transport v. Trucking Unlimited*, 404 U.S. 508 (1972) (“The right of petition is one of the freedoms protected by the Bill of Rights ... The right of access to the courts is indeed but one aspect of the right of petition.”).

Also indicative of the statute’s unconstitutionality, is that neither the caselaw nor the statute itself mentions or identifies any public interest threatened or affected, or any clear and present danger posed by allowing citizens to represent themselves in civil matters. The statute is unconstitutional precisely for this reason, as the

Supreme Court has required that any attempt to restrict First Amendment liberties must be justified by clear public interest, threatened by clear and present danger. *Schneider v. State of New Jersey*, 308 U.S. 147, 60 S.Ct. 146 (1939). The statute is silent on these elements, and the caselaw upholding its constitutionality is also uniformly silent on these requirements. *See supra*.

Indeed, the Texas caselaw construing the statute and finding the provisions valid, do not identify a clear and present danger, nor do they discuss the vexatious litigant statute's plain chilling effect on a citizen's freedom to access the courts pro se. Further, the caselaw is arbitrary and capricious and violates Appellant's Fourteenth Amendment right to the protections of the First Amendment: access to the courts, due process, equal protection, adequate notice (void for vagueness) and overbreadth. *See Clemmons v. Congress of Racial Equality*, 201 F. Supp. 737, 747 (E.D. La. 1962).

The vexatious litigant statute impairs a litigant's right to proceed unimpaired pro se in a Texas trial court and thus is per se unconstitutional. The freedom to represent oneself, as a pro se litigant in a civil case, is a protected substantive legal right in both state and federal courts. Tex. R. Civ. P. 7 ("Any party to a suit may appear and prosecute or defend his rights therein, either in person or by an attorney

of the court.”). Pro se litigants are already held to the same standards as attorneys and must comply with all applicable and mandatory rules of procedure. *See Foster v. Williams*, 74 S.W.3d 200, 202 (Tex. App.—Texarkana 2002, pet. denied) (pro se litigants are held to the same standards as licensed attorneys). Many citizens exercise this right in civil cases in part because of the extraordinary expense of hiring attorneys; therefore, it impairs lower income citizens’ rights to access the courts, which must be held unconstitutional.

In applying the foregoing constitutional provisions, this Court should grant issue five because the statute is unconstitutional on its face—as the finding deprived Appellant of her constitutionally protected rights, privileges and immunities, without due process or due course of law. *See California Motor Transport v. Trucking Unlimited*, 404 U.S. at 510 (“The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms.”).

For example, in *Chambers v. Baltimore and Ohio Railroad Company*, 207 U.S. 142, 148 (1907), the Supreme Court of the United States first declared that citizens have a fundamental constitutional right to sue and defend, calling the right to access the Courts “one of the highest and most essential privileges of

citizenship”...” the right conservative of all other rights” the federal Constitution protects:

In the decision of the merits of the case there are some fundamental principles which are of controlling effect. The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each state to the citizens of all other states to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity between the states, but is granted and protected by the Federal Constitution.

Likewise, in *Jackson v. Procunier*, 789 F.2d 307, 310 (5th Cir. 1986), the United States Court of Appeals for the Fifth Circuit recognized the deliberate denial of a litigant’s right of access to the Courts to pursue a civil appeal, constitutes the deprivation of a substantive constitutional right protected by the First Amendment, as well as, a potential deprivation of substantive and procedural due process:

A substantive right of access to the courts has long been recognized. In *Ryland v. Shapiro*, we characterized that right as ‘one of the fundamental rights protected by the Constitution.’ In *Wilson v. Thompson*, we stated, ‘it is by now well established that access to the courts is protected by the First Amendment right to petition for redress of grievances.’ That right has also been found in the fourteenth amendment guarantees of procedural and substantive due process. Consequently, interference with access to the courts may constitute the deprivation of a substantive constitutional right, as well as, a potential deprivation of property without due process, and may give rise to a claim for relief under Sec. 1983. Any deliberate impediment to access, even a delay of access, may constitute a constitutional deprivation.

In *Ryland v. Shapiro*, 708 F.2d 967, 971 (5th Cir. 1983), the 5th Circuit recognized that: “under our Constitution, the right of access to the Courts is guaranteed and protected from unlawful interference and deprivations by the state, and only compelling state interests will justify such intrusions.” These fundamental rights, which have been recognized for more than two centuries, are not protected by the vexatious litigant statute—but instead, are extinguished by the statute, and should be struck down by this Court. *See id.*

The statute unconstitutionally restricts, and continues to restrict, Appellant’s access to the courts pro se, which cannot be reconciled with the First and Fourteenth Amendment freedoms to petition, access to the courts, and due process. *Marbury v. Madison*, 5 U.S. (1 Cranch) at 176–178 (“The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? ... So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide the case conformably to the law, disregarding the constitution; or conformably to the

constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.”).

The statute may not be reconciled with the Texas Constitutions’ open courts provision and remedy by due course of law, either. *See* Tex. Const. art. 1 § 13. This Court has concluded otherwise. *See Leonard v. Abbott*, 171 S.W.3d at 456-458. While this Court’s analysis in *Leonard* is plainly the most in-depth analysis of any court of appeals that has addressed the issue, the Court should revisit the issue, as the statute does not have a defined purpose in the law, it acts as a prior restraint (without the requirements to show a clear public interest, threatened by clear and present danger), it inarguably infringes on a citizen’s liberty to redress civil injuries, and becomes an irreversible life sentence (if, for a procedural or substantive reason, the so branded citizen cannot obtain a reversal in the one shot provided through ordinary appellate review), the statute continues to impose burdens on the citizen, and can be (and is) arbitrarily applied. *See In re Goode*, 821 F.3d 553, 559 (5th Cir. 2016) (“a prior restraint is constitutional only if the Government can establish that the activity restrained poses either a clear and present danger or a serious and imminent threat to a protected competing interest”).

In summary, the Court should grant issue five because the vexatious litigant statute, Tex. Civ. Prac. & Rem. Code §11.054 and § 11.101, violates the Texas and United States Constitutions, as shown *supra*, rendering the statute void or otherwise overly broad, arbitrary, capricious, and punitive, on its face and as applied. *See United Mine Workers of Am., Dist. 12 v. Illinois State Bar Ass'n*, 389 U.S. 217, 221-22 (1967). The Court should take this opportunity to protect Texas citizens' fundamental constitutional rights where the application of Chapter 11 of the Civil Practice and Remedies Code clearly infringes upon them.

PRAYER

The Court hold that Chapter 11 constitutes an unconstitutional prior restraint on citizens and that it unconstitutionally restricted and continues to restrict Appellant's constitutional rights to petition, due process of law, due course of law, and the open courts' provision of the Texas Constitution.

Appellant further prays that this Court grant Appellant's issues for review and vacate the vexatious litigant order for want of jurisdiction.

Alternatively, Appellant prays that the Court reverse the trial court's vexatious litigant declaration against Connor for harmful error and abuse of discretion and

order that the Clerk of this Court furnish the Office of Court Administration with a copy of its opinion and corresponding judgment vacating the order.

Respectfully submitted,

/s/ Madeleine Connor
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CERTIFICATE OF COMPLIANCE

I certify that this document contains 9955 words in the portions of the document that are subject to the word limits of Texas Rule of Appellate Procedure 9.4(i)(3), as measured by the undersigned counsel's word-processing software.

/s/Madeleine Connor
MADELEINE CONNOR

CERTIFICATE OF SERVICE

I certify that this instrument was served by electronic service on the following counsel of record for Appellee on the 20th day of November, 2019: Sherry Rasmus at sgrasmus@rasmusfirm.com.

/s/ Madeleine Connor
Madeleine Connor

No. 03-19-00198-CV

In the Court of Appeals
Third Judicial District

Madeleine Connor,
Appellant

vs.

Douglas Hooks,
Appellee

From the 201st District Court of Travis County, Texas
Cause number D-1-GN-18-005130
The Honorable Catherine Mauzy, District Judge Presiding

APPENDIX

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CAUSE NO. D-1-GN-18-005130

IN RE MADELEINE CONNOR § IN THE DISTRICT COURT
§
§ 201st JUDICIAL DISTRICT
§
§
§ OF TRAVIS COUNTY, TEXAS

NOTICE OF APPEAL

TO THE HONORABLE DISTRICT JUDGE CATHERINE MAUZY:

COMES NOW, Petitioner Madeleine Connor, and files this her notice of appeal from the Court's March 8, 2019, order "Determining Plaintiff [sic] a Vexatious Litigant."

The trial court is the Honorable Catherine Mauzy, of the 419th District Court of Travis County, and the trial court number and style from which Petitioner appeals is *In re Madeleine Connor*, D-1-GN-18-005130, in the 201st District Court of Travis County, Texas.

The order appealed from was signed and filed on March 8, 2019. Petitioner, Madeleine Connor desires to appeal all decisions of fact and law from the March 8, 2019, order, and any and all implicit decisions from the order, and any decisions to be made in the case.

Petitioner, Madeleine Connor, desires to appeal to the Third Court of Appeals. Petitioner Madeleine Connor is the party filing the appeal. The appeal is accelerated.

WHEREFORE, PREMISES CONSIDERED, Petitioner Connor seeks review of all adverse rulings made, or to be made, by the Court in this cause number.

Respectfully submitted,

s/ Madeleine Connor
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CERTIFICATE OF SERVICE

I certify that this instrument was served by electronic service, on the following persons on the 26th day of March 2019: Robert Nunis at bnunis@nunislaw.com, Sherry Rasmus at sgrasmus@rasmusfirm.com.

s/ Madeleine Connor
Madeleine Connor